FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 759.

GEORGE D. QUIGLEY and SAFEWAY TRAILS, INC., *Petitioners*,

v.

THE PUBLIC SERVICE COMMISSION OF MARYLAND, PENNSYLVANIA GREYHOUND, a Corporation, and CAPITAL TRANSIT COMPANY, a Corporation, *Respondents*.

BRIEF OF CAPITAL TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

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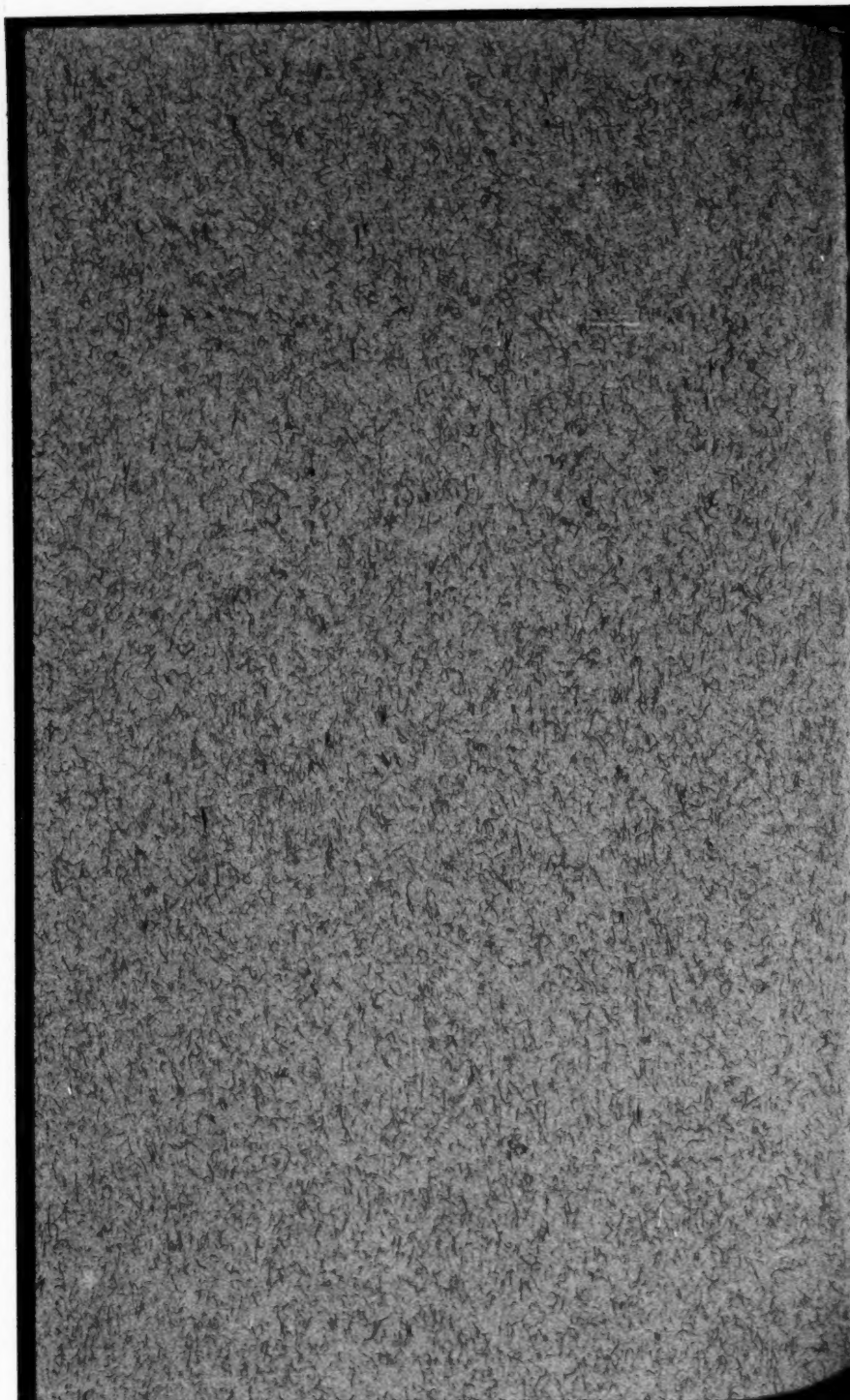

SUBJECT INDEX.

	Page
Table of Cases, Statutes and Authorities	i, ii
Opinion Below	1
Objections to Jurisdiction	1
Statement of the Case	2
Argument	4
I. No Federal right was specially set up, claimed, or decided by the State Court	4
II. The Federal questions sought to be raised are not substantial	6
III. Petitioner Quigley has shown no personal legal interest or Federal rights involved	10
IV. Conclusion	11

TABLE OF CASES.

Bell Telephone Co. v. Pennsylvania Pub. Util. Comm., 309 U.S. 30, 60 S.Ct. 411	10
Bosley v. Quigley, — Md. —, 56 A. 2d 834	1
Bowe v. Scott, 233 U.S. 658, 34 S.Ct. 769	6
Buck v. Kuykendall, 267 U.S. 307, 45 S.Ct. 324	9, 10
Bush v. Maloy, 267 U.S. 317, 45 S.Ct. 326	9, 10
Chicago I. & L. Ry. v. United States, 270 U.S. 287, 46 S.Ct. 226	8
Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 44 S.Ct. 72	8
Eichholz v. Public Service Commission, 306 U.S. 268, 59 S.Ct. 532	10
Interstate Busses Corp. v. Holyoke St. Ry. Co., 273 U.S. 45, 47 S.Ct. 298	10
Louisiana & P. B. Ry. Co. v. United States, 257 U.S. 114, 42 S.Ct. 25	8
Lubetich v. United States, 315 U.S. 57, 62 S.Ct. 449	8
Market St. Ry. Co. v. Railroad Commission, 324 U.S. 548, 65 S.Ct. 770	9
Miller v. Cornwall R. Co., 168 U.S. 131, 18 S.Ct. 34	6

Page

Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 54 S.Ct. 692 8
Nashville, C. & St. L. Ry. v. Tennessee, 262 U.S. 318, 43 S.Ct. 583 8
Solvuca v. Ryan & Reilly Co., 131 Md. 265 7
South Carolina State Highway Dept. v. Barnwell, 303 U.S. 177, 58 S.Ct. 510 9
Spiller v. Atchison, T. & S. F. Ry. Co., 253 U.S. 117, 40 S.Ct. 466 8
Tyler v. Judges of Court of Registration, 179 U.S. 405, 21 S.Ct. 206 11
United States v. Northern Pac. Ry. Co., 288 U.S. 490, 53 S.Ct. 406 8
United States v. Pierce Auto Freight Lines, 327 U.S. 515, 66 S.Ct. 687 9

TABLE OF STATUTES, RULES AND TEXTS.

Constitution of the United States, 14th Amendment ... 6
Declaration of Rights of Maryland, Art. 19 6
Declaration of Rights of Maryland, Art. 23 ..... 6, 7
28 U.S.C.A. § 344(b) (Section 237(b), Judicial Code).. 2, 4
49 U.S.C.A. § 302(b) 10
Maryland Code, Art. 23, Section 417 7
Maryland Court of Appeals, Rule 9 5
Supreme Court, Rule 12(1) 5
Supreme Court, Rule 38(2) 5
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, § 70 6
§ 269 11

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OPINION BELOW.

The Opinion of the Court of Appeals of Maryland has not been officially reported as yet but appears as *Bosley, et al.* v. *Quigley,* 56 Atl. 2d 834, and appears in the printed record at pages 87-101.

OBJECTIONS TO JURISDICTION.

Respondent, Capital Transit Company, respectfully suggests that this Court has no jurisdiction to issue a writ

of certiorari to the Court of Appeals of Maryland, under the provisions of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. §344(b)), for the following reasons:

(1) No federal right was specially set up or claimed in a timely manner.

(2) No federal claim was either sustained against Petitioners or denied by the State Court.

(3) The decision of the State Court rests upon adequate non-federal grounds.

(4) The federal questions sought to be raised are not substantial.

(5) Petitioner Quigley has no personal legal interest or right involved in the proceedings here or in the State courts.

STATEMENT OF THE CASE.

The proceedings in the State courts arose out of an order of the Public Service Commission of Maryland, dated January 22, 1947, dismissing an application of Petitioner Safeway Trails, Inc., for intra-state authority to conduct local passenger motor bus service between Baltimore, Maryland, and the Maryland-District of Columbia line via U. S. Route No. 1 and all intermediate points (R. 3, 13, 15-16). The order of the Maryland Commission also dismissed proceedings before it arising out of a request by Petitioner George D. Quigley, a bus user in the area, for similar authority to be granted to Safeway (R. 16, 40-43). Quigley alone made application for rehearing before the Commission (R. 45-65). The Commission reopened Quigley's proceeding for purposes of oral argument (R. 37), and on March 12, 1947 reaffirmed its order of January 22, 1947 (R. 16-17).

Separate Bills of Complaint against the Commission's orders were filed by Safeway (R. 2-17) and Quigley (R. 32-65) in the Circuit Court for Prince George's County,

Maryland. Neither Bill of Complaint brought before the Court the record of the proceedings before the Commission except the application of Safeway (R. 12-13), the petition of Quigley (R. 40-43), the application for rehearing by Quigley before the Commission (R. 45-65), and the orders of the Commission complained of (R. 14-17, 43, 65). Neither Bill of Complaint specially set up or claimed any federal title, right, privilege or immunity.

Upon demurrers by all Respondents (R. 27-31, 67-71) being overruled by the Circuit Court (R. 72-86), the Court of Appeals of Maryland reversed the orders of the Circuit Court and ordered the Bills of Complaint dismissed with costs (R. 87-102). Motions for reargument in both appeals (R. 103-113, 114-124) were denied by the Court of Appeals of Maryland (R. 113, 124). Neither the opinion of the Circuit Court for Prince George's County (R. 72-84) nor the opinion of the Court of Appeals of Maryland (R. 87-101) shows that any federal claim was sustained, denied, or otherwise decided. The decisions in each case were based upon non-federal grounds. The decision of the State Court below rests squarely on its view that the allegations of the Bills did not show by clear and satisfactory evidence that the orders of the Commission complained of are unlawful or unreasonable, within the meaning of the State statutes governing review of such orders (R. 95-101).

The Safeway application for intrastate authority filed with the Maryland Commission was not confined to a mere restoration of "the service that it had furnished the public during the period between 1942 and 1945", as asserted by Petitioners (Petition, p. 3). The intrastate authority granted Safeway between 1942 and 1945 was granted as a wartime measure pursuant to requirement of the Office of Defense Transportation (R. 7, 34); and was terminated upon cessation of hostilities as an incident to the reduction of the war emergency authority of the Federal Government (R. 7). Such emergency authority as was granted

was confined to the area between College Park, Maryland, and Baltimore (R. 7); and such authority did not result in competition with the bus operations of Capital Transit south of College Park and between that point and the Maryland-District Line (Petition, p. 3). Safeway's application in the instant case before the Maryland Commission requested intrastate authority for the entire length of the route between Baltimore and the Maryland-District Line (R. 3, 13), including that part of the route south of College Park, Maryland, now served by Capital Transit. In neither Bill of Complaint are there any allegations with respect to the adequacy of the existing service of Capital Transit or any need for or evidence of public interest in additional service by Safeway in the area south of College Park.

ARGUMENT.

I.

No Federal Right Was Specially Set Up, Claimed, Or Decided by the State Court.

In invoking the jurisdiction of this Court the Petition for Certiorari merely cites Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1945 (28 U. S. C. A. § 344(b)), without any statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the decree in question. Neither the Petition nor the supporting Brief shows that the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied on; nor does the jurisdictional statement of the Petition specify the stage in the proceedings in the court of first instance, and in the appellate court, at which, and the manner in which the federal questions sought to be reviewed were raised; the method of raising them; and the way in which they were passed upon by the court; with such pertinent quotations or references as will support any assertion that the rulings of the State court were of a nature to bring the case

within the statutory provision believed to confer jurisdiction on this Court. (Rules 12(1), 38(2))

It is apparent from the Record that no such compliance with the Rules was attempted because no federal title, right, privilege or immunity was specially set up or claimed by either Petitioner in the Bills of Complaint or otherwise in the proceedings in the court of first instance; and, as a result, no federal claim was either sustained, denied, or otherwise decided by either of the State courts. With respect to the questions sought to be presented by the Petition for Certiorari (Petition, p. 2) there was no allegation in either Bill of Complaint asserting the violation of any federal right as distinguished from a State right or claiming protection under the Constitution or laws of the United States. The Circuit Court for Prince George's County, accordingly, decided the issues presented by the demurrers solely under the State statutes on non-federal grounds (R. 79, 82-83).

Rule 9 of the Court of Appeals of Maryland provides that:

> "In no case shall the Court of Appeals decide any point or question which does not plainly appear by the record to have been tried and decided by the Court below."

In view of this Rule, under the State practice there was no occasion for the Court of Appeals of Maryland to sustain, deny, or decide any federal claims, rights, or questions. Its decision reversing the Circuit Court, on the question of the adequacy of the well-pleaded allegations to show any ground upon which the court could set aside the orders of the Commission, was based squarely and adequately upon its view that such allegations were insufficient under the provisions for review provided by the State statutes (R. 95-101). There is no suggestion, nor can there be in this case, that the non-federal grounds of the decisions of the courts below were resorted to for the purpose of evading any federal question.

For the first time in the proceedings below Petitioners sought to raise a federal question under the Commerce Clause of the Constitution of the United States (similar to the last question sought to be presented here) in their Motions for Reargument before the Court of Appeals of Maryland (R. 103, 114). The State Court denied the motions without further opinion (R. 113, 124). It is the settled rule of this Court that federal questions first presented in a petition for rehearing to the highest court of the state in which a decision could be had are not timely raised unless the state court actually entertains the petition and expressly passes upon the federal questions. *Robertson and Kirkham*, "Jurisdiction of the Supreme Court of the United States", § 70.

II.

The Federal Questions Sought to Be Raised Are Not Substantial.

The first question sought to be presented by the Petition for Certiorari (Petition, p. 2), and the corresponding error alleged (Petition, p. 5), is based upon a claim of lack of "judicial review as contemplated under the due process clause of the Constitution" because of a failure by the State court to examine the record before the Maryland Commission. It cannot necessarily be assumed that the due process clause of the 14th Amendment to the Constitution of the United States was referred to by the phrase used since it could equally refer to the similar safeguards under Articles 19 and 23 of the Maryland Declaration of Rights which are part of the Maryland constitution. *Miller* v. *Cornwall R. Co.*, 168 U. S. 131, 18 S. Ct. 34; *Bowe* v. *Scott*, 233 U. S. 658, 664, 665, 34 S. Ct. 769.

Article 19 of the Maryland Declaration of Rights provides:

> "That every man, for any injury done to him in his person or property ought to have a remedy by the

course of the Law of the Land and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to Law of the Land."

Article 23 of such Declaration provides:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land."

This provision has been held by the Court of Appeals of Maryland to mean the same thing as "due process of law", *Solvuca* v. *Ryan & Reilly Co.*, 131 Md. 265, 270.

But here the assertion of deprivation of constitutional rights is without substance because Petitioners themselves failed to bring before the State courts below the entire record of the proceedings before the Commission. Section 417, Article 23 of the Code of Maryland, as amended by Ch. 607, Laws of Md. 1947, applicable to the actions brought in the State courts in this case provides as follows:

"Before trial of such action a transcript duly certified by the Secretary of the Commission of all the papers and proceedings, including evidence, in the case before the Commission except such as are omitted by the stipulation in writing of the parties to such action, shall be filed by the Commission in such action and shall be evidence in like manner as the originals transcribed, *provided however,* that in any action wherein the Commission, or any intervening party, shall demur or file any other responsive pleading other than an answer to a complaint filed under Section 415 of this subtitle, such transcript shall not be filed until the court shall have acted upon such demurrer or other responsive pleading and until an answer shall have been filed."

Under this Maryland statute Petitioners were required to file the record before the Commission with the Court as

part of their pleadings if they wished to have the entire record open to the Court on a possible demurrer. Similar action is required of complainants against orders of the Interstate Commerce Commission where they desire to raise questions as to the sufficiency of the evidence before the Commission. This Court has uniformly held that, in the absence of the entire record before the Commission being brought before the courts, the courts will not consider the question of the sufficiency of the evidence to support the findings of the Commission but will assume that such findings are supported by the record. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286, 54 S. Ct. 692; *Lubetich* v. *United States,* 315 U. S. 57, 58, 62 S. Ct. 449; *United States* v. *Northern Pac. Ry. Co.,* 288 U. S. 490, 499-500, 53 S. Ct. 406; *Chicago I. & L. Ry* v. *United States,* 270 U. S. 287, 295, 46 S. Ct. 226; *Edward Hines Yellow Pine Trustees* v. *United States,* 263 U. S. 143, 148, 44 S. Ct. 72; *Nashville, C. & St. L. Ry.* v. *Tennessee,* 262 U. S. 318, 324, 43 S. Ct. 583; *Louisiana & P. B. Ry. Co.* v. *United States,* 257 U. S. 114, 116, 42 S. Ct. 25; *Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 125, 40 S. Ct. 466.

The second question sought to be raised (Petition, pp. 2, 5) is based upon a claim of lack of a fair trial "under the due process clause of the Constitution". This assertion is open to the same question as to whether the State constitution or the Constitution of the United States is meant. The State Court below demonstrated that the question was without substance when it held that "if the Commission on March 12, 1947, improperly considered observations of its own members or members of its staff, not offered in evidence, this would not invalidate its original order". (R. 98)

So far as any federal question of lack of due process is concerned, the matters alleged to have been considered by the Commission outside of the record did not result in substantial prejudice to any property or federal rights of

either Petitioner. Therefore, "the mere fact that the determining body has looked beyond the record proper does not invalidate its action" in this instance. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 529-530, 66 S. Ct. 687; *Market Street R. Co.* v. *Railroad Commission*, 324 U. S. 548, 561-562, 65 S. Ct. 770.

The third question sought to be raised (Petition, pp. 2, 5; Brief, pp. 14-16) is based upon a claim of denial of equal protection of the laws by discrimination against Safeway in favor of another interstate carrier. As the question is stated in the Petition we submit that no federal question is raised. To the extent Petitioners base their contentions in connection with this question on *Buck* v. *Kuykendall*, 267 U. S. 307, 45 S. Ct. 324; *Bush* v. *Maloy*, 267 U. S. 317, 45 S. Ct. 326; and *South Carolina State Highway Dept.* v. *Barnwell*, 303 U. S. 177, 58 S. Ct. 510, such contentions have no support. Those cases all decided that the Commerce Clause of the Constitution of the United States prohibits discrimination against interstate commerce. The action of the Maryland Commission in this case, in denying intrastate authority to one of two competing interstate carriers, is not a discrimination against interstate commerce nor a denial of equal protection of the laws. To hold otherwise is to say that the State Commission must grant intrastate authority to all competing interstate carriers even though under the rule of *Buck* v. *Kuykendall, supra*, and *Bush* v. *Maloy, supra*, it has no control over who may compete in interstate commerce.

The fourth question sought to be raised (Petition, pp. 2, 5) is based upon a claim that the action of the Maryland Commission denying intrastate authority to Safeway places an undue burden on Safeway's interstate activities in violation of the Commerce Clause. In so contending Petitioners also rely upon *Buck* v. *Kuykendall, supra*, and *Bush* v. *Maloy, supra*, despite the fact that the decisions in those cases only applied to consideration by a State commission of competitive questions in applications for the

use of State highways in interstate commerce. The right of a State to withhold intrastate authority for any reasons of State policy was not involved in those cases. Where, as in *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.*, 273 U. S. 45, 47 S. Ct. 298, a similar contention was raised on the basis of the *Kuykendall* and *Maloy* cases, this Court held that the prohibition of the carriage of intrastate passengers by an interstate carrier in order to prevent destructive competition with other intrastate carriers was not shown to be a burden on interstate commerce in violation of the Commerce Clause. See also *Eichholz* v. *Public Service Comm.*, 306 U. S. 268, 273, 59 S. Ct. 532; *Bell Telephone Co.* v. *Pennsylvania Pub. Util. Comm.*, 309 U. S. 30, 60 S. Ct. 411.

Moreover, Congress, by Section 202(b) of Part II of the Interstate Commerce Act (49 U. S. C. A. § 302(b)), in enacting regulatory statutes pertaining to motor carriers in interstate commerce, carefully preserved the authority of the States on the very matters involved in this case by providing as follows:

> "Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

III.

Petitioner Quigley Has Shown No Personal Legal Interest Or Federal Rights Involved.

Petitioner Quigley is in the position of a user of existing bus service along the route in question complaining of the action of the State Commission denying competitive intrastate rights to another carrier already conducting an interstate business along such route. As a user of service Quigley has no right, federal or otherwise, to competition

between two carriers contrary to the policy of the State. It is elementary that a Petitioner to this Court must show an interest in the action personal to himself. *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 406, 21 S. Ct. 206. Certainly Quigley cannot complain here of an asserted injury to Safeway. *Robertson and Kirkham,* "Jurisdiction of the Supreme Court of the United States", § 269.

IV.

Conclusion.

In conclusion we submit that Petitioners' Brief and Petition present a very strained effort to find some federal question in the decision of the Court of Appeals of Maryland; and that the federal questions sought to be raised were not timely raised and verge on the frivolous.

The Petition should be denied for lack of jurisdiction.

Respectfully submitted,

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May, 1948.